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Supreme Court, U.S.
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No. 04-1363

In The
Supreme Court of the United States

UNITED STATES OF AMERICA ex rel.
JACK J. GRYNBERG,

Petitioner,

v.

PRAXAIR, INC. and NIELSON & ASSOCIATES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 15.6, Petitioner, Jack J. Grynberg ("Grynberg") submits this Joint Reply in Support of his Petition for Writ of Certiorari, which shall reply to the Opposition to Petition for a Writ of Certiorari filed by Praxair, Inc. and to Nielson & Associates, Inc.'s Brief in Opposition to Petition for a Writ of Certiorari (sometimes collectively "Opposition Briefs").

I. Corrections to Opposition Briefs' Statement of Facts.

In both of the Opposition Briefs, the defendants seek to portray the government as having "full knowledge" of the fraud which Grynberg alleged. Praxair Opposition, pp. 1-3, Nielson Opposition, pp. 5-6. However, the declarations of the government witnesses on whom they rely undercut this assertion. For instance, the MMS Chief of Enforcement who supposedly had "full knowledge", stated that approval of the defendants' operations at the McCallum Fields was "based on the available information" which the defendants, themselves, had provided. *United States ex rel. Grynberg v. Praxair, Inc.*, 207 F.Supp.2d 1163, 1171-72 (D.Colo. 2001), *aff'd in part, rev'd in part*, 389 F.3d 1038 (10th Cir. 2004).

Another BLM employee, who was responsible for monitoring the accuracy of Praxair's measurements, stated that the BLM was aware that Praxair's plant was "losing *some* amount of gas" at its facilities, (emphasis added); however, had he known the nature or extent of losses of CO_2 at Praxair's plant, he would have been concerned. While the United States declined to intervene in the case, it stated "Our decision to decline [to intervene] should not be construed as a statement about the merits of the case."

Grynberg's information showed that the government did not have "full knowledge" of what had transpired at Praxair's facilities, and that approvals were gained because of that fact.

II. Reply to New Matters Raised in Opposition Briefs.

A. New Legal Arguments.

1. The FOIA Document. The premise of Praxair's legal analyses[1] is that every element of the fraud was disclosed in the FOIA document. That premise is factually as well as legally incorrect. A "public disclosure" occurs when what is disclosed – exclusively from the sources listed in the statute – is either the fraud itself or all of the elements from which fraud can be inferred. *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F. 3d 645, 654 (D.C. Cir. 1994).

Even a casual reading of the FOIA document, which is reproduced as Appendix J to Grynberg's Petition, shows that it disclosed only a facially unexceptionable transaction. Grynberg discovered from other sources the elements necessary to show that the transaction was the source of fraudulent reports. As to the volume claim, the FOIA document described only the fact of tailgate measurement, but not the fact of unauthorized venting nor the fact that the representations about the return line – on which the tailgate measurement "approval" was based – were false. As to the

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[1] Nielson's legal arguments on this issues are merely disagreements with arguments and conclusions in Grynberg's Petition and thus are not "new matters".

value claim, the FOIA document revealed only that there was a contract price, said nothing about the market value of the CO_2 that was sold to Praxair, nor that the contract price did not include the required "gross-up" for production cost deductions.

2. Public Disclosure. Praxair argues that the Court of Appeals held that the FOIA document *alone* disclosed all the necessary elements of the fraud. Although the opinion speaks for itself, Grynberg would note that the public disclosure discussion begins with "*the public domain* contained all the elemental aspects of the allegedly fraudulent transaction." *Praxair*, 389 F.3d at 1051 (emphasis added). Thus the FOIA document was considered *together with* the extra-statutory sources (such as the information from a state oil and gas commission and a private service). This contribution of sources from the "public domain" is not consistent with the restrictive listing in 31 U.S.C. §3730(e)(4).

3. Based Upon. Praxair argues that the Court of Appeals looked at *only* the FOIA disclosure in assessing the information on which Grynberg's action was "based." The Tenth Circuit did indeed include in its "based upon" analysis material from "the public domain", and not just material from the statutory sources. For example, the Tenth Circuit's holding describes as essential facts both the "venting of gas" and the comparison of contract prices with market prices. Even under the capacious reading of the Tenth Circuit, neither of those facts were even suggested by the FOIA document (which does not identify a market price and which said "[t]he remaining gas will be compressed and reinjected into the Dakota-Lakota zone.") *Id.* at 1052. *See, e.g., United States ex rel. Ervin & Associates, Inc. v.*

The Hamilton Securities Group, Inc., 332 F. Supp. 2d 1, 9 n.5 (D. D.C. 2003): "To the extent that [a relator] may have relied on facially innocuous documents obtained under FOIA, such 'disclosures' do not necessarily bar *qui tam* jurisdiction."

4. Original Source. Most of Praxair's argument with regard to the original source issues is merely a disagreement with the arguments and conclusions in Grynberg's Petition. As such, they are not "new matters," and Grynberg respectfully refers the Court to the Petition for his reply.

5. Conflicts Among the Circuits. Nielson's legal argument rests on the categorically false proposition that there are no conflicts between the Circuits of which this Court should take notice, explaining the variability among decisions as only "a perception of how the statute is applied in differing factual situations." Nielson Opposition, p. 13. As the opinions cited in Grynberg's Petition show, however, the Circuits themselves announce the conflicts when dealing with questions of first impression under the FCA, most particularly the provisions of 31 U.S.C. §3730(e)(4) which dominate in this case. All of the major commentators have said the same, namely, that divisions among the Circuits are rife in the cases interpreting the portions of the FCA which are at issue here.[2]

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". . . the case law has become a complex and tangled web of doctrine . . . careful attention to the cases *in the circuit in which a case is brought* is essential." C. Sylvia, *The False Claims Act: Fraud Against the Government* (2004) at 639 (emphasis added).

(continued...)

6. Lack of Jurisdiction to Award Attorneys' Fees Against Grynberg. In his Petition, Grynberg provided a host of authority which hold that if a district court lacked subject matter jurisdiction over a "claim in the first instance, it also lacked the power to award attorney's fees." Petition, p. 25, quoting *Branson v. Nott*, 62 F.3d 287 at 292-293 (9th Cir.), *cert. denied*, 516 U.S. 1009 (1995), and other cited cases. Praxair provides no authority to the contrary. Instead, it attempts to dodge these holdings by advancing spurious arguments.

Praxair's contention that there is a "total lack of conflicting decisions" on the attorneys' fee issue is dubious. Praxair Opposition, p. 23. The Tenth Circuit, itself, recognized that there was a split of authority between the Ninth, Eighth and Second Circuits, on the one hand, and the Seventh Circuit on the other hand, as to whether a court which lacks jurisdiction over a case may nonetheless award attorneys fees. *See Praxair,* 389 F.3d at 1055-1058. It adopted the minority approach taken by the Seventh

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[2](...continued)
"Courts follow two diverging paths in determining " the meaning of "based upon" in §3730(e)(4), *Id.* at 666. As to the original source issue, "courts have divided on what information, and how much information, must be direct and independent . . ." *Id.* at 673. "There are at least three distinct approaches to 'public disclosure' and four distinct analyses to 'original source' on the parts of Courts of Appeal." J. Helmer, *False Claims Act: Whistleblower Litigation* (3d Ed. 2002) at 235. "The 'original source' rule has become (along with 'public disclosure') the most litigated -- and confused -- issue under the *qui tam* provisions." Boese, Op. Cit. at 4-89.

Circuit. *Id.*, citing *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923 (7th Cir. 2000).

Praxair next floats the argument that "the conflict [between Circuits] that Grynberg alleges would exist only if §3730(d)(4) was analogous to the fee provisions in 42 U.S.C. §1988 and the IDEA, an erroneous proposition that Grynberg never even asserts." Praxair Opposition, p. 20. This criticism is torpedoed by the simple fact that it was the Tenth Circuit that found those statutes analogous:

> The FCA does not define the terms 'clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment,' but the Act's legislative history suggests that the standard of section 3730(d)(4) is analogous to that used for claims for attorneys fees brought under 42 U.S.C. §1988.

Praxair, 389 F.3d at 1055, citing *Texas State Teacher's Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). *See also, Praxair*, 389 F.3d at 1056, n. 18 comparing the FCA attorneys' fee provision by analogy to 42 U.S.C. §11046(f).

Finally, it is duplicitous for Praxair to argue that "describing §3730(e)(4) as 'jurisdictional' is somewhat of a misnomer . . .", Praxair Opposition, p. 22, when the Tenth Circuit repeatedly stated that, "[s]atisfaction of the provisions of 31 U.S.C. §3730(e)(4) is a question of *subject matter jurisdiction,*" and labeled §3730(e)(4) as a "jurisdictional bar". *Praxair*, 389 F.3d at 1048, 1050 (emphasis added), quoting *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1003 (10th Cir.

1996). In both the appellate and lower courts, Praxair repeatedly urged that §3730(e)(4) was "jurisdictional" in order to justify dismissal of Grynberg's case.

7. Praxair Did Not Prevail on Any Claim in the Litigation. In an FCA case the real party in interest is the United States of America. *See* 31 U.S.C. §3730(b)(1), (c) (relator's action brought "in the name of the Government", and only the Government may settle or dismiss the case). When an FCA case is dismissed for lack of subject matter jurisdiction, the defendant does not "prevail" because a party can only prevail upon a claim if it receives "at least some relief on the merits of [its] claim . . ." *Horner v. Kentucky H. Sch. Ath. Ass'n*, 206 F.3d 685, 698 (6th Cir. 2000). There has been no ruling on the merits of Grynberg's FCA claims.

The United States remains free to file an action to pursue the identical claims that Grynberg tried to assert. *See* 31 U.S.C. §3730(c)(5) ("Government may elect to pursue its claim through any alternative remedy available to the Government"). Neither Praxair nor Nielson would be able to argue that the disposition of Grynberg's action affects the ability of the United States to file an action based on the same claims.

B. New Issues Raised in Opposition Briefs.

One or both of the Opposition Briefs argue that Grynberg's claims fail on four questions other than those presented in the Petition, making review of this case inappropriate. Each of the arguments is substantively incorrect and all of them are irrelevant. The Tenth Circuit decided the case on jurisdictional grounds, expressly

declining to consider any of the additional questions which Praxair and Nielson have raised. *Praxair*, 389 F.3d at 1042, 1049 n.14, 1054 n.16. If the writ is granted and the Court of Appeals' decision is reversed, presumably the case will be remanded for further proceedings, including these additional questions. The substantive merits of each of the four additional grounds is discussed below.

1. Were the Royalty Reports "Knowingly" False? Nielson's Counterstatement of the Facts and Praxair's Other Reasons for Denying the Writ incorrectly assert that, because their measurement practices were "known and approved of," their royalty reports could not have been "knowingly" false. However, government knowledge and even government approval do not preclude a finding that false statements are "knowingly" false.

Congress amended the FCA in 1986 partly because it found that fraud was frequently perpetrated on the government even when the agency was provided with most of the relevant facts.[3] The amendments were designed to encourage private relators to pursue such frauds which the government had not unraveled. Thus, in 1986 Congress removed the former "government knowledge," defense.[4]

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[3] J. Boese, *Civil False Claims and Qui Tam Actions* (2d Ed. Supp. 2004) at 1-20, recounting Congressional "alarm and impatience over what was perceived as rampant fraud and government acquiescence."

[4] *See* discussion in *Shaw v. AAA Engineering and Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000).

Some cases do hold that government knowledge of a deviation from *contract* specifications counters the claim that the invoices were "knowingly" false. All such cases, however, involve *contracts*. *See, e.g. United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1156 (2nd Cir. 1993). That exception has no application where, as here, falsity lies in the knowing violation of a *regulation*. Defendants, for example, at the very least knew that the royalty statements did not reflect the market price and did not "gross up" the sale price to include the value added to the carbon dioxide by Praxair.[5] No government agent can modify, expressly or by acquiescence, such regulatory requirements. *See, United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F.Supp. 218, 223 (D.Md. 1995); *United States v. Kates*, 419 F.Supp. 846 (E.D.Pa. 1976); *United States v. Mack*, 2000 U.S.Dist.LEXIS 17367 (S.D. Tex 2000). Moreover, the government's knowledge and supposed acquiescence is at most a disputed matter to be considered on remand.

2. Does the Pre-1986 Government Knowledge Bar Apply to Post-1986 False Statements? Praxair asserts that because the government knew of its reporting practices before 1986, the pre-1986 government knowledge defense precludes Grynberg's action based on those practices after 1986. In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 952 (1997), this Court held that the 1986 amendments to the FCA would not be applied retroactively. *See also, United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999) (holding that the pre-1986 bar applies only to statements made before 1986). The false statements

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[5] 30 C.F.R. §206.151, defining "gross proceeds".

Grynberg alleges in this case were all made in 1988 or later.

3. Was the Disclosure to Nucor a Public Disclosure? Nielson argues that jurisdiction does not exist because of discussions held in Nucor's presence during a meeting between the defendants and the MMS. A disclosure is not a "public disclosure" unless it is made to a "stranger to the fraud" who has no disincentive to make the information public. *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F. 3d 1538, 1545-46 (10th Cir. 1996). Nucor was a co-owner of the leases with Nielson, with its own obligation to report the royalties correctly. *See* 30 C.F.R. §206.151 (2001) (definition of "lessee".) It is at most a triable issue of fact whether Nucor was a stranger to the fraud.

4. Did Grynberg Fail to File Required Disclosure Statements? The Opposition Briefs argue that Grynberg cannot be a proper relator because he did not submit the pre-filing information required of an "original source" under 31 U.S.C. §3730(e)(4)(B). Again, this was a question that the Court of Appeals explicitly decided *not* to address. *Praxair,* 389 F.3d at 1054, n.16.

CONCLUSION

In order to answer fundamental questions about actions which private citizens may bring under the FCA, and to resolve serious divisions among the Circuits on those issues, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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